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BUMBO (PTY) LTD.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DYLAN LAMM, a minor by and  
through his guardian ad litem, MARY  
CATHERINE DOHERTY; and KEVIN  
LAMM,

Plaintiffs,

vs.

BUMBO, BUMBO LIMITED, BUMBO  
(PTY) LTD.; TARGET  
CORPORATION; and DOES 1 to 20,

Defendants.

Case No. C 07-04807 MHP

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO QUASH SERVICE,  
DISMISS FOR IMPROPER  
SERVICE, LACK OF PERSONAL  
JURISDICTION AND FAILURE TO  
SERVE, AND FOR SANCTIONS

Date: February 25, 2008

Time: 2:00 p.m.

Place: Courtroom of the Hon.  
Marilyn Hall Patel

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# TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES .....   | ii-iii      |
| INTRODUCTION .....   | 2           |
| FACTUAL AND PROCEDURAL BACKGROUND .....  | 3           |
| ISSUES TO BE DECIDED .....   | 7           |
| STANDARD .....   | 8           |
| ARGUMENT .....   | 9           |
| I.    BUMBO-PTY SHOULD BE DISMISSED AS PLAINTIFFS<br>HAVE FAILED TO EFFECT SERVICE OF PROCESS ON<br>DEFENDANT .....  | 9           |
| II.   THIS COURT CANNOT EXERCISE <i>IN</i><br><i>PERSONAM</i> JURISDICTION OVER BUMBO-PTY. ....  | 10          |
| A. PLAINTIFFS CANNOT SHOW THAT BUMBO-PTY HAS THE<br>REQUISITE MINIMUM CONTACTS WITH CALIFORNIA TO<br>JUSTIFY GENERAL JURISDICTION .....  | 12          |
| B. THIS COURT CANNOT ASSERT SPECIFIC JURISDICTION<br>OVER BUMBO-PTY .....  | 13          |
| III.  THE COURT SHOULD IMPOSE SANCTIONS<br>BECAUSE PLAINTIFFS' COUNSEL HAS ACTED<br>UNREASONABLY AND VEXTATIONOUSLY IN FORCING<br>BUMBO-PTY TO EXPEND UNNECESSARY COSTS<br>AND FEES IN SEEKING TO DISMISS THIS ACTION BASED<br>UPON A KNOWINGLY FRAUDULENT PROOF OF SERVICE .. | 16          |
| CONCLUSION .....   | 18          |

## TABLE OF AUTHORITIES

| Cases  | Page(s)    |
|--|------------|
| <i>Amba Marketing Sys., Inc. v. Jobar Int'l, Inc.</i> ,<br>51 F.2d 784, 787 (9 <sup>th</sup> Cir. 1977).....     | 11         |
| <i>Asahi Metal Indust. Co. v. Superior Court of California</i> ,<br>80 U.S. 102, 114 (1987) .....                | 12, 14, 15 |
| <i>B.M.K. v. Maui Police Dep't</i> ,<br>76 F.3d 1091, 1106 (9 <sup>th</sup> Cir. 2002).....                      | 16         |
| <i>Burger King Corp. v. Rudzewicz</i> ,<br>71 U.S. 462, 475 (1985) .....   | 11         |
| <i>Chambers v. NASCO, Inc.</i> ,<br>01 U.S. 32, 43 (1991) .....  | 16         |
| <i>Core-Vent Corp. v. Nobel Industries AB</i> ,<br>1 F.3d 1482, 1484 (9 <sup>th</sup> Cir. 1993).....            | 11         |
| <i>Data Disc., Inc. v. Sys. Technology Assoc., Inc.</i> ,<br>57 F.2d 1280, 1287 (9 <sup>th</sup> Cir. 1977)..... | 14         |
| <i>Dean v. Motel 6 Operating L.P.</i> ,<br>34 F.3d 1269, 1275-76 (6 <sup>th</sup> Cir. 1998).....                | 11         |
| <i>Decker Coal Co. v. Commonwealth Edison Co.</i> ,<br>05 F.2d 834, 838 (9 <sup>th</sup> Cir. 1986).....         | 11         |
| <i>Felix v. Bomoro Kommanditgesellschaft</i> ,<br>96 Cal. App. 3d 106 (1987).....                                | 15         |
| <i>Helicopteros Nacionales de Columbia, S.A. v. Hall</i> ,<br>66 U.S. 408, 416 (1984) .....                      | 13         |
| <i>Jackson v. Hayakawa</i> ,<br>82 F.2d 1344, 1347 (9 <sup>th</sup> Cir. 1982).....                              | 9          |

|    |  |        |
|----|--|--------|
| 1  | <i>Landis Revin Nutraceuticals v. Arthur Andrew Medical, Inc. (Slip Opinion)</i> |        |
| 2  | 2007 WL 391744 (E.D. Cal. 2007) .....  | 16, 17 |
| 3  | <i>Marshall v. Warwick,</i>  |        |
| 4  | 155 F.3d 1027, 1030 (8 <sup>th</sup> Cir. 1998) .....                            | 9      |
| 5  |  |        |
| 6  | <i>Montalbano v. Easco Hand Tools, Inc.,</i>                                     |        |
| 7  | 766 F.2d 737, 740 (2 <sup>d</sup> Cir. 1985).....                                | 8      |
| 8  |  |        |
| 9  | <i>Norlock v. City of Garland,</i>   |        |
| 10 | 768 F.2d 654, 656 (5 <sup>th</sup> Cir. 1985).....                               | 8      |
| 11 | <i>Omeluck v. Langsten Slip &amp; Batbygerri A/S,</i>                            |        |
| 12 | 2 F.3d 267, 270 (9 <sup>th</sup> Cir. 1995).....                                 | 12     |
| 13 | <i>Pumphrey v. K.W. Thompson Tool Co.,</i>                                       |        |
| 14 | 2 F.3d 1128, 1131 (9 <sup>th</sup> Cir. 1995).....                               | 16     |
| 15 | <i>Rano v. Sipa Press, Inc.,</i>   |        |
| 16 | 87 F.2d 299, 301 (9 <sup>th</sup> Cir. 1993).....                                | 14     |
| 17 | <i>Rio Properties, Inc. v. Rio Int'l Interlink,</i>                              |        |
| 18 | 284 F.3d 1007, 1019 (9 <sup>th</sup> Cir. 2002).....                             | 8      |
| 19 | <i>Sher v. Johnson,</i>  |        |
| 20 | 11 F.2d 1357, 1360 (9 <sup>th</sup> Cir. 1990).....                              | 10, 11 |
| 21 | <i>VCS Samoa Packing Co. v. Blue Continent Products (PTY) Ltd.,</i>              |        |
| 22 | 3 F. Supp. 2d 1151, 1154 (S.D. Cal. 1998).....                                   | 14, 15 |
| 23 | <i>Wood v. Santa Barbara Chamber of Commerce,</i>                                |        |
| 24 | 05 F.2d 1515, 1522 (9 <sup>th</sup> Cir. 1983).....                              | 14     |
| 25 | <i>Ziegler v. Indian River County,</i>   |        |
| 26 | 4 F.3d 470, 473 (9 <sup>th</sup> Cir. 1995).....                                 | 12, 13 |
| 27 | //   |        |
| 28 | //   |        |

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**Stautes**

28 U.S.C. 1927.....9, 16, 18

Cal. Code Civ. Proc. 410.10 ..... 11

Fed. R. Civ. Proc. 4(h)(1) .....9

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## INTRODUCTION

On January 7, 2008, an Affidavit of Service ("Affidavit") was filed by plaintiffs' counsel in this action. This Affidavit purported service of process on "Bumbo Limited", a non-existent business entity. As it is unclear whether plaintiffs are purporting to have served defendant Bumbo (Pty) Ltd. ("Bumbo-Pty"), Bumbo-Pty is bringing this motion to set aside default, quash service for lack of personal jurisdiction and failure to serve and for sanctions.

"Bumbo Limited," the defendant allegedly served and defaulted in this action, does not exist.<sup>1</sup> Plaintiffs claim that they have successfully served "Bumbo Limited" in Conroe, Texas. The moving defendant, Bumbo-Pty, is the only entity named as a defendant which is an actual legal entity. Plaintiffs have failed to effectively serve Bumbo-Pty, and this Court lacks personal jurisdiction over defendant.

Bumbo-Pty is a South African corporation which manufactures a product known as the "Baby Sitter." Bumbo-Pty's office and manufacturing facilities are located in South Africa. Plaintiffs purported to serve "Bumbo Limited" by serving Mark Buchanan ("Buchanan"), who is believed to be an officer of Wartburg Enterprises, Inc. ("Wartburg"), a Florida corporation with its principal place of business in Texas.<sup>2</sup> (See *Affidavit*.)

Wartburg is a distributor of the "Baby Sitter". Because neither Buchanan nor Wartburg is an agent for service of Bumbo-Pty and neither are authorized to accept service of process on its behalf, Bumbo-Pty has yet to be properly served,

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<sup>1</sup> Plaintiffs have also allegedly sued "Bumbo," another non-existent defendant, but, to moving party's knowledge, plaintiffs have yet to attempt to serve "Bumbo" in this action. Plaintiff has, however, purported to serve "Bumbo" in the case of *Whitson v. Bumbo*, et al., Case No. C07-05597 CW, also venued in this court in Hon. Claudia Wilken's department. This purported service in the *Whitson* action is also the subject of a motion to quash/motion to dismiss, scheduled for hearing on February 21, 2008.

<sup>2</sup> In the *Whitson* matter, referenced above, plaintiff purportedly served Dione Buchanan, Buchanan's wife as "owner" for Bumbo. In this case, Buchanan himself was purportedly served as owner for "Bumbo Limited."

1 and its motion to dismiss this action pursuant to Federal Rule of Civil Procedure  
2 12(b)(5) should be granted.

3 Further, Bumbo-Pty seeks dismissal of the action based on the absence of  
4 personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2).  
5 Bumbo-Pty is not subject to general or specific personal jurisdiction in California.

6 Finally, Bumbo-Pty seeks sanctions against plaintiffs and plaintiffs' counsel  
7 for vexatiously and unreasonably multiplying the proceedings in this action and  
8 necessitating this motion.

### 9 FACTUAL AND PROCEDURAL BACKGROUND

10 Plaintiffs, Dylan Lamm, Mary Catherine Doherty, and Kevin Lamm  
11 ("Plaintiffs"), all California residents<sup>3</sup>, allege that on May 23, 2007, Kevin Lamm  
12 placed then six month old Dylan, into the Bumbo Baby Sitter ("Baby Sitter").  
13 Plaintiffs further allege that while seated in the Baby Sitter, Dylan "fell over and  
14 out of the Bumbo Baby Sitter, striking his head and other parts of his body on the  
15 ground, and thereby sustaining severe, permanent, and nearly life-threatening  
16 injuries." (See *Plaintiff's Complaint* ("Complaint"), ¶12.) Plaintiffs contend that  
17 the Baby Sitter is "a product designed for use by infants" and further, that  
18 "[d]efendant BUMBO describes the product as 'a revolutionary new concept . . .  
19 uniquely designed according to the baby's posture to seat babies independently in  
20 an upright sitting position, from as young as 3 months up to an age of  
21 approximately 14 months ... thereby providing a snug and cozy environment for  
22 your baby.'" <sup>4</sup> (*Id.* at ¶9.) Plaintiffs allege that the Baby Sitter was received as a  
23 gift in May 2007 from an unnamed "friend" who purchased the item at a Target  
24 Store in Sonoma County, California. (*Id.* at ¶11.)

25  
26  
27 <sup>3</sup> Mary Catherine Doherty and Kevin Lamm are the parents of the minor child, Dylan Lamm.

28 <sup>4</sup> Although this quote is attributed to "Bumbo", there is no reference anywhere in the Complaint as to where this quote originated. Nor are there any attachments to the Complaint where this quote may be found.



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Plaintiffs contend that the Baby Sitter and/or its component parts were “defective, unsafe and unreasonably dangerous for their intended use.” (*Id.* at ¶16.) Plaintiffs further contend that they suffered general, special, actual and compensatory damages as a “direct and proximate result” of said defects. (*Id.* at ¶¶18, 19.) There are no references in the Complaint as to what these alleged defects actually are. In addition, there are no references to the amount of damages being sought by plaintiffs, except for a general allegation that the total amount of damages are believed “to be in excess of the minimum jurisdictional limit of this Court.”

Plaintiffs bring claims under the following causes of action: Strict Product Liability, Negligence, Wrongful Infliction of Emotional Distress and Injunctive Relief Under Business & Professions Code Sec. 17200 against defendants, Bumbo, Bumbo Limited, Bumbo (Pty) Ltd. and Target Corporation.<sup>5</sup>

Defendant Target is a corporation domiciled in Minnesota with retail locations in California, as well as in many other states. (*Id.* at ¶4.) Bumbo-Pty is a South African company that manufactures a product known as the “Baby Sitter.” (*Id.* at ¶¶3,9.) Bumbo-Pty products are sold through distributors and retailers, world-wide. Target sold the Baby Sitter in California and other states.

Target has appeared in this action and has not contested the Court’s jurisdiction as to the claims against it and is defending the action on its merits.

On December 27, 2007, Plaintiffs purportedly attempted to serve “Bumbo Limited” by serving Mark Buchanan, ostensibly as “owner” of “Bumbo Limited” at 12248 Fm 1485, Conroe, TX 77306. (*See* Affidavit).<sup>6</sup> Mark Buchanan is not an

<sup>5</sup> This motion is brought on behalf of defendant Bumbo (Pty) Ltd. As discussed above, Bumbo (Pty) Ltd. has no knowledge, ownership or control of purported business entities “Bumbo” or “Bumbo Limited,” and believes that these are nonexistent entities.

<sup>6</sup> At the risk of appearing repetitious, according to the Affidavit, only a defendant named “Bumbo Limited” was allegedly served. “Bumbo Limited” does not exist. Thus, it is unclear at this time whether plaintiffs were even attempting to serve Bumbo-Pty. For the purposes of this motion, moving party assumes this to be the case.



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“owner” of Bumbo-Pty. Mark Buchanan also is not an officer, director, managing agent or employee of Bumbo-Pty. Bumbo-Pty has no office or place of business at 12248 FM 1485, Conroe, Texas. Buchanan further is not authorized to accept service on behalf of Bumbo-Pty. (*Declaration of Johan Nicholas Buitendach* (“*Buitendach Decl.*”), ¶27).

Bumbo-Pty is a corporation that is domiciled and existing under the laws of South Africa. (See *Complaint*, ¶3; *Buitendach Decl.*, ¶4.) Bumbo-Pty’s principal place of business is in Pretoria, South Africa. (*Buitendach Decl.*, ¶4.) Bumbo-Pty does not have an office or employees at the address where service allegedly occurred. (*Id.* at ¶28.) Bumbo-Pty also does not have any corporate offices, warehouses or manufacturing facilities in Texas, California, or any other location in the United States. (*Id.* at ¶9.) Bumbo-Pty is not registered or licensed to do business in Texas, California, or any other location in the United States. (*Id.* at ¶11.)

Bumbo-Pty is informed and believes that one of its U.S. distributors, Wartburg, maintains a facility at the address where service was purportedly affected. (*Id.* at ¶25.) Wartburg is not a “Bumbo” entity and is a corporation separate and distinct from Bumbo-Pty. Wartburg is incorporated in the state of Florida with its principal place of business in Texas. Wartburg also is not an agent for service of process for Bumbo-Pty. (*Id.* at ¶¶ 21-28.) (See also *Exhibit “D”* to *Declaration of Jennifer J. Johnston* (“*Johnston Decl.*”).)

In November 2007, Bumbo-Pty learned through Target that a lawsuit had been filed against Target and Bumbo-Pty. (*Johnston Decl.*, ¶2.) Bumbo-Pty initially retained Condon & Forsyth LLP (“C & F”) to monitor the court docket. (*Id.* at ¶4.) Bumbo-Pty had no information that it had been served, but it learned through Target that Donald C. Edgar (“Edgar”), plaintiffs’ attorney, was claiming

1 that he had served "Bumbo." (*Id.* at ¶3.) Bumbo-Pty requested C & F to contact  
 2 plaintiffs' counsel and request information about the purported service. (*Id.* at ¶5.)

3 On November 19, 2007, Jennifer J. Johnston ("Johnston"), a partner at C &  
 4 F, sent a letter to plaintiff's counsel requesting information regarding the purported  
 5 service of the summons and complaint. The letter further requested that counsel  
 6 advise Johnston before a default was requested. (*Id.* at ¶6; See *Exhibit "A"* to  
 7 *Johnston Decl.*)<sup>7</sup>

8 In response, Johnston received a letter dated November 21, 2007, from  
 9 Plaintiff's counsel refusing to provide C & F with any information regarding  
 10 service or to "enter into any agreements" with Johnston regarding the decision of  
 11 whether Plaintiff would seek default. (*Id.* at ¶7; See *Exhibit "B"* to *Johnston*  
 12 *Decl.*) Johnston then sent another letter to Plaintiff's counsel advising that C & F  
 13 had no information regarding any service on Bumbo-Pty and further requesting  
 14 that counsel "refrain from any attempts to take a default judgment against Bumbo."  
 15 (*Id.* at ¶8; See *Exhibit "C"* to *Johnston Decl.*)

16 In addition, multiple telephone calls were made from Jessica Viker  
 17 ("Viker"), a paralegal at C & F, to the office of Plaintiff's counsel during the  
 18 months of November and December 2007, requesting information on service. (See  
 19 *Declaration of Jessica Viker ("Viker Decl.")*, ¶2.) Viker first spoke to Jeremy R.  
 20 Fietz, Esq. ("Fietz") who advised that he had no knowledge whatsoever of the case  
 21 and that Edgar would be the person with whom to speak. (*Id.* at ¶3.) Despite  
 22 leaving a message for Edgar, Viker never received a return phone call. (*Id.* at ¶4.)  
 23 Viker then elected to telephone Edgar again who stated that "Bumbo" had been  
 24

25 \_\_\_\_\_  
 26 <sup>7</sup> Some of the correspondence in this action may reference the above-mentioned *Whitson* action  
 27 Plaintiffs' counsel has also refused to provide Bumbo-Pty's counsel with any information  
 28 regarding service in the *Whitson* action. Thus, much of the communication from C&F to  
 plaintiffs' counsel has been applicable to both actions. As discussed above, a motion to  
 quash/dismiss has already been filed in the *Whitson* action based upon a similarly defective  
 affidavit of service.

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served "in South Africa," "sometime in October," but refused to give any details regarding when and how the service had been effected, or even the exact date on which service had allegedly been effected. (*Id.* at ¶5.)

On December 19, 2007, C & F was retained to defend Bumbo-Pty in both this matter and the *Whitson* action. After learning that a default based upon a defective affidavit had been entered against Bumbo-Pty in the *Whitson* matter, C & F filed a motion to set aside the default, quash service, dismiss for insufficiency of service of process and lack of personal jurisdiction and for sanctions due to plaintiff's vexatious and unreasonable conduct. This motion was filed on December 28, 2007. (*Id.* at ¶10.)

C & F learned that plaintiffs filed an affidavit of service on January 7, 2008, claiming that they had affected service in the subject action on "Bumbo Limited" by serving "Mark Buchanan" as "owner" in Conroe, Texas. C & F attempted to obtain information about the purported service and learned that the summons and complaint were, again, delivered to Wartburg. (*Id.* at ¶9.)

After learning of the defective Affidavit filed in the *Lamm* case, Johnston sent yet *another* letter to plaintiffs' counsel advising, again, that neither Wartburg nor Buchanan was authorized to accept service of process on behalf of Bumbo-Pty and requesting that counsel immediately withdraw their Affidavit. Plaintiff's counsel has not responded to this letter nor have they withdrawn their Affidavit as of the date of the filing of this motion. (*Johnston Decl.*, ¶12; See *Exhibit "E"* to *Johnston Decl.*) In addition, Bumbo-Pty's counsel has still not received any communication from Plaintiff's counsel regarding any service issue in either this case or the *Whitson* action. (*Id.* at ¶13.)

#### ISSUES TO BE DECIDED

1. Did plaintiffs properly serve process on Bumbo-Pty by personally serving the summons and complaint, on behalf of a non-existent defendant, at the

1 address of a Texas facility of a Florida corporation which serves as a  
 2 distributor for Bumbo-Pty, when said corporation does not serve as officer,  
 3 director, employee, or agent for service of process of Bumbo-Pty?

- 4 2. Are there sufficient contacts between Bumbo-Pty, a South African  
 5 corporation with no offices, property or employees in the United States and  
 6 the state of California to satisfy the constitutional requirements for the  
 7 exercise of personal jurisdiction over Bumbo-Pty in this venue?
- 8 3. Did plaintiffs and their counsel engage in sanctionable, bad faith conduct by  
 9 refusing to provide Bumbo-Pty's counsel with any information regarding  
 10 service and filing a defective affidavit of service when plaintiffs and counsel  
 11 had repeatedly been given evidence that said affidavit was defective?

#### 12 STANDARD

13 Federal Rule 12(b)(5) permits a challenge to the method of service attempted  
 14 by plaintiff(s). If a Rule 12(b)(5) motions is granted, the court may dismiss the  
 15 action. *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2<sup>d</sup> Cir. 1985).  
 16 Where the validity of service is contested by a Rule 12 motion, the burden is on  
 17 plaintiff (the party claiming proper service has been effected) to establish the  
 18 validity of service. *Norlock v. City of Garland*, 768 F.2d 654, 656 (5<sup>th</sup> Cir. 1985).

19 Under Rule 12(b)(2), a defendant may be dismissed from an action if the  
 20 court determines that it does not have personal jurisdiction over the defendant.  
 21 Again, although defendant is the moving party on the motion to dismiss, plaintiff is  
 22 the party who invoked the court's jurisdiction. Therefore, plaintiff bears the  
 23 burden of proof on the necessary jurisdictional facts; *e.g.*, the existence of  
 24 "minimum contacts" between defendant and the forum state. *Rio Properties, Inc.*  
 25 *v. Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9<sup>th</sup> Cir. 2002).

26 Finally, Section 1927 of the United States Code provides that "any attorney  
 27 or other person admitted to conduct cases in any court of the United States or any  
 28

1 Territory thereof who so multiplies the proceedings in any case unreasonably or  
 2 vexatious may be required by the court to satisfy personally the excess costs,  
 3 expenses, and attorneys' fees reasonably incurred because of such conduct." 28  
 4 U.S.C. §1927.

### 5 ARGUMENT

#### 6 I. BUMBO-PTY SHOULD BE DISMISSED AS PLAINTIFFS HAVE 7 FAILED TO EFFECT SERVICE OF PROCESS ON DEFENDANT

8 Plaintiffs' attempted service of the summons and complaint on Bumbo-Pty  
 9 was defective, and Bumbo-Pty should be dismissed pursuant to Federal Rule of  
 10 Civil Procedure 12(b)(5).

11 An individual defendant, or in some cases, an entire action, may be  
 12 dismissed when a plaintiff fails to properly serve the summons and complaint.  
 13 *Marshall v. Warwick*, 155 F.3d 1027, 1030 (8<sup>th</sup> Cir. 1998).

14 The Federal Rules of Civil Procedure pertaining to service upon foreign  
 15 corporations provide that service shall be made upon a domestic or foreign  
 16 corporation "by delivering a copy of the summons and of the complaint to an  
 17 officer, a managing or general agent, or to any other agent authorized by  
 18 appointment or by law to receive service of process." *Fed. R. Civ. Proc.* 4(h)(1).

19 Unless a plaintiff properly serves a defendant with summons and complaint,  
 20 the court lacks personal jurisdiction over that defendant. *Jackson v. Hayakawa*,  
 21 682 F.2d 1344, 1347 (9<sup>th</sup> Cir. 1982). Neither actual notice of the complaint, nor  
 22 simply naming the defendant in the caption, subjects a defendant to personal  
 23 jurisdiction absent service that complies with Rule 4. *Ibid.*

24 In the case at hand, there are numerous problems with plaintiffs' alleged  
 25 service of process on Bumbo-Pty. The Affidavit of Service filed with this Court  
 26 states that "Mark Buchanon" was served as "Owner" for "Bumbo Limited." (See  
 27 *Affidavit, supra.*) However, as discussed above, Bumbo-Pty has no knowledge,  
 28



ownership or control of a business entity called "Bumbo Limited." In fact, to defendant's knowledge, "Bumbo Limited" does not exist.<sup>8</sup>

Further, as discussed above, Mark Buchanan is not an "owner" of Bumbo-Pty. Mark Buchanan also is not an officer, director, managing agent or employee of Bumbo-Pty. Bumbo-Pty has no office or place of business at 12248 FM 1485, Conroe, Texas. Buchanan further is not authorized to accept service on behalf of Bumbo-Pty.

Finally, because Wartburg is not an agent for service of process for Bumbo-Pty, service upon Wartburg does not amount to effective service on Bumbo-Pty. Wartburg's only connection to Bumbo-Pty is that Wartburg is one of multiple distributors of the "Baby Sitter." The two companies are incorporated in different countries, run separate operations and exist independently of each other. Each has its own employees and its own independent headquarters.

Service of process should be quashed and Bumbo-Pty should be dismissed from this action due to plaintiffs' failure to properly serve the summons and complaint.

## II. THIS COURT CANNOT EXERCISE *IN PERSONAM* JURISDICTION OVER BUMBO-PTY

There are two limitations on the court's power to exercise personal jurisdiction over a nonresident defendant: (1) the applicable state or federal personal jurisdiction statute and (2) constitutional principles of due process. *Sher v. Johnson*, 911 F.2d 1357, 1360 (9<sup>th</sup> Cir. 1990). Where, as is the situation here, there is no applicable federal statute governing personal jurisdiction, the law of the state in which the district sits applies. *Core-Vent Corp. v. Nobel Industries AB*, 11

<sup>8</sup> Interestingly, in the *Whitson* matter, Mark Buchanan's wife, Dione Buchanan was served as "owner" of "Bumbo", another non-existent business entity. It appears that plaintiffs' counsel have not done their homework and are planning to continue serving Wartburg-related individuals as "owners" of different Bumbo-related names until they somehow effect service by process of



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1 F.3d 1482, 1484 (9<sup>th</sup> Cir. 1993). Because California's long-arm statute allows  
 2 courts to exercise personal jurisdiction to the extent permitted by the Due Process  
 3 Clause of the United States Constitution, this Court need only determine whether  
 4 personal jurisdiction in this case would meet the requirements of due process. *Id.*;  
 5 see *Cal. Code Civ. Proc.* § 410.10.

6 The Due Process Clause mandates that a nonresident defendant must have  
 7 sufficient minimum contacts with the forum state such that the exercise of personal  
 8 jurisdiction does not offend traditional notions of fair play and substantial justice.  
 9 *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 838 (9<sup>th</sup> Cir. 1986).  
 10 The defendant's conduct and connection with the forum must be such that the  
 11 defendant should reasonably anticipate being haled into court there. *Sher, supra*,  
 12 911 F.2d at 1361, citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286,  
 13 297 (1980). Defendant is entitled to protection from suits based on "random,  
 14 fortuitous, or attenuated" contacts with the chosen forum. *Burger King Corp. v.*  
 15 *Rudzewicz*, 471 U.S. 462, 475 (1985).

16 The constitutional standard may be satisfied in one of two ways: through  
 17 general jurisdiction or specific jurisdiction. The burden of showing the existence  
 18 of personal jurisdiction is on the party seeking to invoke the court's jurisdiction.  
 19 *Amba Marketing Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9<sup>th</sup> Cir. 1977).  
 20 To establish a prima facie case, plaintiff must produce admissible documentary  
 21 evidence containing facts sufficient to support a finding of personal jurisdiction.  
 22 *Sher v. Johnson, supra*, 911 F.2d at 1361.

23 A foreign defendant receives deference when determining whether the acts  
 24 of the defendant have a substantial enough connection with the forum state to make  
 25 the exercise of jurisdiction over the defendant reasonable due to its status as a  
 26 foreign company. *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1275-76 (6<sup>th</sup>  
 27

28 elimination.

1 Cir. 1998). "The unique burdens placed upon one who must defend oneself in a  
 2 foreign legal system should have significant weight in assessing the reasonableness  
 3 of stretching the long arm of personal jurisdiction over national borders." *Asahi*  
 4 *Metal Indust. Co. v. Superior Court of California*, 480 U.S. 102, 114 (1987).

5 **A. Plaintiffs Cannot Show That Bumbo-PTY Has the Requisite**  
 6 **Minimum Contacts with California to Justify General Jurisdiction**

7 General jurisdiction exists if the nonresident's contacts with the forum are  
 8 continuous and systematic and the exercise of jurisdiction satisfies traditional  
 9 notions of fair play and substantial justice. *Ziegler v. Indian River County*, 64 F.3d  
 10 470, 473 (9<sup>th</sup> Cir. 1995). If general jurisdiction exists, the court has jurisdiction  
 11 over the defendant even if the cause of action is unrelated to the defendant's forum  
 12 activities. *Omeluck v. Langsten Slip & Batbygerri A/S*, 52 F.3d 267, 270 (9<sup>th</sup> Cir.  
 13 1995).

14 Plaintiffs cannot establish sufficient minimum contacts for general  
 15 jurisdiction. Bumbo-Pty is a private company which is organized under the laws  
 16 of South Africa and has its principal place of business in Pretoria, South Africa.  
 17 (*Buitendach Decl.*, ¶4.) A number of facts indicate this lack of jurisdiction. For  
 18 example:

- 19 • Bumbo-Pty does not now have and never has had any office,  
 20 warehouse or manufacturing facility in California;
- 21 • Bumbo-Pty does not now have and never has any employees in the  
 22 state of California;
- 23 • Bumbo-Pty does not now and never has had a business license in  
 24 California;
- 25 • Bumbo-Pty does not now own and never has owned any real or  
 26 personal property in California;
- 27 • Bumbo-Pty does not now maintain and never has maintained a bank  
 28

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1 account in California;

- 2 • Bumbo-Pty does not now have and never has had a California
- 3 telephone number;
- 4 • Bumbo-Pty does not now have and never has had a mailing address in
- 5 California;
- 6 • Bumbo-Pty has never paid any taxes in California;
- 7 • Bumbo-Pty has never conducted any meetings of its board of directors
- 8 in California;
- 9 • Bumbo does not maintain a sales force in California;
- 10 • Bumbo-Pty does not now advertise and has never advertised in
- 11 California;
- 12 • Bumbo-Pty does not now have and never has had any agents for
- 13 service of process in California;
- 14 • Bumbo-Pty does not now and never has had any distributors in
- 15 California authorized to accept service of process on behalf of
- 16 Bumbo.
- 17

18 (*Buitendach Decl.*)

19 Based on the above facts, Bumbo-Pty does not have the continuous and  
20 systemic contacts courts require when determining whether the exercise of  
21 jurisdiction satisfies traditional notions of fair play and substantial justice. *Ziegler*,  
22 *supra*, 64 F.3d at 473. The absence of substantial contacts with California is  
23 sufficient for Bumbo-Pty to successfully challenge the exercise of general  
24 jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408,  
25 416 (1984).

26 ///

27 ///

1                   **B. This Court Cannot Assert Specific Jurisdiction Over Bumbo-Pty**

2                   The Ninth Circuit applies a three-part test in determining whether it may  
3 assert specific jurisdiction over a defendant:

- 4                   • the defendant must perform an act or consummate a transaction within  
5 the forum, purposefully availing itself of the privilege of conducting  
6 activities in the forum and invoking the benefits and protections of its  
7 laws;  
8                   • the claim must arise out of or result from the defendant's forum-  
9 related activities; *and*  
10                  • the exercise of jurisdiction must be reasonable.

11                  *Rano v. Sipa Press, Inc.*, 987 F.2d 299, 301 (9<sup>th</sup> Cir. 1993).

12                  The determination of specific jurisdiction is a conjunctive test which "turns  
13 on an evaluation of the nature and quality of defendant's contacts in relation to the  
14 cause of action." *Data Disc., Inc. v. Sys. Technology Assoc., Inc.*, 557 F.2d 1280,  
15 1287 (9<sup>th</sup> Cir. 1977). The party asserting jurisdiction has the burden of proof once  
16 the issue is raised. *Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515,  
17 1522 (9<sup>th</sup> Cir. 1983).

18                  "With respect to goods and services in the international marketplace, the  
19 mere placement of a product into the stream of commerce is not necessarily  
20 sufficient to establish jurisdiction." *VCS Samoa Packing Co. v. Blue Continent*  
21 *Products (PTY) Ltd.*, 83 F. Supp. 2d 1151, 1154 (S.D. Cal. 1998), citing *World-*  
22 *Wide Volkswagen Corp., supra*, 444 U.S. at 297-298. "Defendant's awareness that  
23 the stream of commerce may or will sweep the product into the forum State does  
24 not convert the mere act of placing the product into the stream into an act  
25 purposefully directed toward the forum State." *Asahi Metal Ind. v. Sup. Ct.*, 480  
26 U.S. 102, 112 (1987). "Moreover, indirect or attenuated contacts or the unilateral  
27 activity of a third party will not support the exercise of specific jurisdiction since it  
28

1 cannot be said that defendant purposely availed himself of the benefits of the  
2 forum.” *VCS Samoa Packing Co., supra*, 83 F. Supp. 2d at 1154, citing, *Keeton v.*  
3 *Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984).

4 In the case of *Felix v. Bomoro Kommanditgesellschaft*, 196 Cal. App. 3d 106  
5 (1987), the court found that “the degree to which a foreign corporation interjects  
6 itself into the forum state directly affects the fairness of subjecting it to  
7 jurisdiction. The smaller the element of purposeful interjection, the less is  
8 jurisdiction to be anticipated and the less reasonable is its exercise.” *Id.* at 115.  
9 “Additional conduct of the defendant may indicate an intent or purpose to serve the  
10 market in the forum State, for example, designing the product for the market in the  
11 forum state, advertising in the forum State, establishing channels for providing  
12 regular advice to customers in the forum State ....” *Id.* at 116, quoting, *Asahi*  
13 *Metal Ind., supra*, 480 U.S. at 112.

14 Applying these principles to the instant case, it would be manifestly unjust to  
15 require Bumbo-Pty to defend against plaintiffs’ suit in California. Bumbo-Pty is  
16 incorporated in South Africa and is not licensed to do business in California.  
17 Bumbo-Pty has no office, affiliate, subsidiary, employee, agent, bank accounts or  
18 business operations in the state. The only possible contacts that Bumbo-Pty could  
19 be said to have with California are by way of the fact that Target, a Minnesota  
20 corporation, has retail stores in California that sold the Baby Sitter. The product  
21 itself, however, is manufactured in South Africa. It was not designed specifically  
22 for the California market. In this case, the finished product was sold and  
23 distributed by Target, not Bumbo-Pty. Target is a corporation that has stores  
24 located nationwide, not just in California. Bumbo-Pty has not advertised, solicited  
25 any business, or otherwise sought to serve any particular market in this state. The  
26 extent to which Bumbo-Pty could reasonably anticipate being involved in litigation  
27 in California was minimal at best.



1 ///

2 III. THE COURT SHOULD IMPOSE SANCTIONS BECAUSE PLAINTIFFS'  
 3 COUNSEL HAS ACTED UNREASONABLY AND VEXATIONOUSLY IN  
 4 FORCING BUMBO-PTY TO EXPEND UNECESSARY COSTS AND  
 5 FEES IN SEEKING TO DISMISS THIS ACTION BASED UPON A  
 6 KNOWINGLY FRAUDULENT PROOF OF SERVICE

7 Section 1927 of the United States Code provides that "any attorney or other  
 8 person admitted to conduct cases in any court of the United States or any Territory  
 9 thereof who so multiplies the proceedings in any case unreasonably or vexatiously  
 10 may be required by the court to satisfy personally the excess costs, expenses, and  
 11 attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. §1927.

12 "Sanctions may be imposed under Section 1927 where an attorney engaged in  
 13 conduct in bad faith, with improper motive, or a reckless disregard of a duty owed  
 14 to the court." *Landis Revin Nutraceuticals, supra*, 2007 WL at \*5, citing *New*  
 15 *Alaska Develop. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9<sup>th</sup> Cir. 1989).

16 A federal court also has inherent power to impose sanctions against both  
 17 attorneys and parties for "bad faith" conduct in litigation, even if the conduct is  
 18 sanctionable under other rules such as Federal Rule of Civil Procedure 11 or  
 19 Section 1927. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). "Bad faith"  
 20 conduct includes findings that that a lawyer or party "acted in bad faith,  
 21 vexatiously, wantonly or for other oppressive reasons." *Id.* at 45-46. Recklessness  
 22 combined with other factors such as frivolousness, harassment or an improper  
 23 purpose, may constitute bad faith warranting sanctions under a court's inherent  
 24 powers." *B.M.K. v. Maui Police Dep't*, 276 F.3d 1091, 1106 (9<sup>th</sup> Cir. 2002). The  
 25 Supreme Court has found that sanctions under the court's inherent power are  
 26 particularly appropriate for fraud practiced upon the court. *Chambers, supra*, 501  
 27 U.S. at 54. "Fraud on the court" involves an "unconscionable plan or scheme  
 28 which is designed to improperly influence the court in its decision." *Pumphrey v.*  
*K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9<sup>th</sup> Cir. 1995).



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In the *Landis Revin Nutraceuticals* case, the court found that counsel for plaintiff had engaged in “bad faith conduct or, at a minimum, reckless conduct in disregard of his duties owed to the court, which unnecessarily and unreasonably multiplied these proceedings.” *Landis Revin Nutraceuticals, supra*, 2007 WL at \*5. Similar to the case at hand, in *Landis Revin Nutraceuticals*, defendants asserted that they were never served with the summons and complaint in this action. Plaintiff’s counsel alleged that defendants were served by registered mail and filed Requests for Entry of Defaults against all defendants. When contacted by counsel for defendants, plaintiff’s counsel then refused to produce copies of the return receipts allegedly signed by defendants, instead contending that his proofs of service alone evidenced service. Counsel also refused to set aside the defaults. Defendants then brought a Motion to Set Aside the Defaults, which was granted. Further, the court ordered plaintiff’s counsel to pay sanctions in the amount of \$10,716 to defendants for the attorney’s fees incurred in setting aside the defaults. *Landis, supra*, 2007 WL 397144.

In the case at issue, Plaintiffs’ counsel have also acted in bad faith, practiced fraud upon the Court, and have unreasonably multiplied the hearings as well as the costs and fees expended in this action. Plaintiffs’ counsel has been aware at least since November 2007 that Bumbo-Pty had retained monitoring counsel in California. Plaintiffs’ counsel has received repeated communications from California counsel advising them that Bumbo-Pty had not received service of process. Plaintiffs’ counsel has also unabashedly refused to cooperate on this issue in any way with defense counsel.<sup>9</sup> In spite of receiving a letter from C & F advising that, contrary to the assertions made in the Affidavit of Service, “Mark

<sup>9</sup> Evidence of this fact can be seen most prominently in the letter from Edgar to Johnston dated November 21, 2007 (attached as *Exhibit “C”* to *Johnston Decl.*) in which Edgar advises that “you all do whatever you all need to do to represent your clients. At this time, we respectfully decline to enter into any agreement(s) set forth in your letter of November 15, 2007.”

Buchanon” is not the owner of “Bumbo Limited” and that Wartburg was not authorized to accept service of process on behalf of Bumbo-Pty, Plaintiff’s counsel still unreasonably refused to withdraw their affidavit.<sup>10</sup> Thus, Plaintiffs’ counsel unreasonably and vexatiously created the need for Bumbo-Pty to bring this motion.<sup>11</sup>

Plaintiffs’ conduct of filing a affidavit that they *knew* to be defective due to numerous communications from defense counsel, without even the courtesy of notifying opposing counsel is deplorable and has only served to multiply the proceedings in this case. These actions represent precisely the kind of vexatious conduct contemplated by 28 U.S.C. §1927. Bumbo-Pty has incurred \$11,922.00 in bringing this motion. (*Johnston Decl.*, ¶17.) Therefore, Bumbo-Pty requests that this Court impose sanctions against Dylan Lamm, Mary Catherine Doherty, Kevin Lamm, Donald S. Edgar, Jeremy R. Fietz and Rex Grady in the amount of \$11,922.00.

### CONCLUSION

By this motion, Bumbo-Pty seeks two forms of relief:

- that the claimed service of process, served upon an unrelated corporation be quashed; and
- that any claim against Bumbo-Pty be dismissed as this Court cannot exercise personal jurisdiction over it. Further, Bumbo-Pty seeks sanctions against Dylan Lamm, Mary Catherine Doherty, Kevin Lamm, Donald S. Edgar, Jeremy R. Fietz and Rex Grady in the amount of \$11,922.00 for their fraudulent and

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<sup>10</sup> It should also be noted that a motion to dismiss was filed on December 28, 2007 regarding the extremely similar affidavit filed in the *Whitson* action.

<sup>11</sup> Since Defense counsel has had very few interactive communications with plaintiffs’ counsel, it is unclear whether plaintiffs themselves have had any role in the above-referenced decisions regarding the service issues. Thus, Defense counsel has no choice but to request sanctions against plaintiffs as well as their counsel.

1 unreasonable conduct in this action.

2 The facts are clear: Plaintiffs have served an unrelated entity of behalf of an  
3 entity which does not exist. Bumbo-Pty has not been served in this action, has not  
4 appeared in this action and does not have any contacts, let alone constitutionally  
5 required minimum contacts, with this forum state. Further, plaintiffs and their  
6 counsel are solely responsible for the costs, expenses and attorneys' fees  
7 reasonably incurred due to their unreasonable and unnecessary conduct.

8  
9  
10 Dated: January 16, 2008

CONDON & FORSYTH LLP

11  
12  
13 By: s/Jennifer J. Johnson  
14 ROD D. MARGO  
JENNIFER J. JOHNSTON

15 Attorneys for *Specially Appearing*  
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